

***Remarks***

Reconsideration of this Application is respectfully requested.

Upon entry of the foregoing amendment, claims 41-73 are pending in the application, with 41, 43, 53 and 63 being the independent claims. Claims 1-40 have been cancelled without prejudice or disclaimer. These changes are believed to introduce no new matter, and their entry is respectfully requested.

Based on the above amendment and the following remarks, Applicants respectfully request that the Examiner reconsider all outstanding objections and rejections and that they be withdrawn.

***Rejections under 35 U.S.C. § 112***

Claims 43-73 were rejected under 35 U.S.C. § 112, second paragraph, as being indefinite. In particular, the Examiner indicates that claims 43, 53 and 63 are confusing and suggests that “first valve” and “second valve” be replaced by “first valve plug” and “second valve plug,” respectively.

The Examiner also indicates that the check valve in claim 56 has no antecedent basis and suggests making claim 56 dependent on claim 55. In addition, the Examiner indicates that in claims 58 and 59 “an opening of said charge fluid passage” appears to be the same as the “charge fluid inlet” that is recited in claim 53. With regard to claim 62, the Examiner believes that the phrase “said first side of said end of said center section, and wherein said opening of” is missing between “adjacent to” and “said drain fluid passage.” In claim 63, the Examiner believes that the claim should be amended to recite that the first check valve is interposed between the “charge fluid inlet” and the first

fluid passage rather than between the “charge fluid passage” and the first fluid passage. The Examiner also states that in claim 65 there is no antecedent basis for the third check valve and suggests that claim 65 be amended to be dependent from claim 64. The claims have been amended as suggested by the Examiner. Accordingly, Applicants respectfully request that the rejection be withdrawn.

The remaining claims not specifically mentioned were rejected because they depend from one of the claims described above. Since the grounds for rejection of the claims described above have been properly accommodated and the remaining claims depend from and add features to one of the claims described above, the remaining claims are patentable for at least the same reasons as discussed with respect to the claims described above. Accordingly, Applicants respectfully request that the rejection be withdrawn.

***Nonstatutory Double Patenting Rejection***

Claims 41-73 were rejected under the judicially created doctrine of obviousness-type double patenting. Claims 41 and 42 were rejected over U.S. Patent No. 6,508,059 to Takada *et al.* and claims 43-71 and 73 were rejected over Takada in view of U.S. Patent No. 5,836,159 to Shimizu *et al.* A terminal disclaimer is filed herewith to overcome this rejection. Applicants therefore respectfully request that the rejection be withdrawn.

***Rejections under 35 U.S.C. § 102***

Claims 41, 43, 47 and 53 have been rejected under 35 U.S.C. § 102(b) as being unpatentable over U.S. Patent No. 5,836,159 to Shimizu *et al.* Independent claims 41, 43, and 53 have been amended to recite a transmission have "a swing arm operatively connected to the hydraulic pump" and a drain fluid passage, "wherein said drain fluid passage is separated from contacting said swing arm." Shimizu does not disclose a swing arm that is *separated from contacting* a drain fluid passage, as claimed. Rather, Shimizu discloses a control arm having a *contact plate 39c* which *abuts* against discharge oil holes 64c to selectively seal the holes 64c. (See FIG. 12, col. 6, lines 43-51, and col. 7, lines 18-33, of the Shimizu patent). Accordingly, Applicants respectfully request that the rejection be withdrawn.

***Rejections under 35 U.S.C. § 103***

Independent claims 43 and 63 and dependent claims 44, 54 and 71 have been rejected under 35 U.S.C. § 103 as being unpatentable over Shimizu in view of U.S. Patent No. 5,356,347 to Komura *et al.* The Examiner relies upon Komura to teach a relief valve in the drain passage that closes when the pressure in the fluid passage connected to the drain passage is increased beyond a predetermined degree. The Examiner states that the drain passages of Shimizu and Komura are functionally equivalent and that it would have been obvious to replace the slot in the control arm of Shimizu with a relief valve in the drain passage that closes when pressure in the fluid passage is increased beyond a predetermined degree.

In order to make a prima facie case of obviousness, the Examiner must satisfy three basic criteria. First, there must be some suggestion or motivation, either in the references cited by the Examiner or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or combine reference teachings to obtain Applicants' invention. See *In re Rouffet*, 149 F.3d 1350, 1357, 47 USPQ2d 1453, 1457-58 (Fed. Cir. 1998). Second, there must be a reasonable expectation of success. See *In re Vaeck*, 947 F.2d 488, 493, 20 USPQ2d 1438, 1442 (Fed. Cir. 1991). Third, all the claim limitations must be taught or suggested by the prior art references. See *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974). Further, the suggestion to make the claimed combination, as well as the reasonable expectation of success, must be found in the prior art references, not in Applicants' disclosure. See *In re Vaeck*, 947 F.2d at 491, 20 USPQ2d at 1442 (Fed. Cir. 1991).

Applicants assert that there is no suggestion or motivation in the references to combine the teachings to obtain Applicants' invention. The drain passages of Shimizu and Komura are not functionally equivalent. Although both drain passages would be closed at a certain pressure, when the swash plate of Shimizu is returned to the neutral position, the drain passage becomes open regardless of the amount of pressure in the fluid passage. However, if a relief valve like the one disclosed in Komura were used in the transmission of Shimizu, as the swash plate is returned to the neutral position, the drain fluid passage would remain closed until the pressure in the fluid passage was reduced enough to allow the relief valve to open. Such a combination would create the braking shock problem that the apparatus of Shimizu is designed to fix. Accordingly,

Shimizu teaches away from the claimed combination. Applicants therefore respectfully request that the rejection be withdrawn.

Further, claim 54 depends from and adds features to claim 53. Accordingly, claim 54 is patentable for at least the same reasons as discussed above with respect to claim 53.

### ***Conclusion***

All of the stated grounds of objection and rejection have been properly traversed, accommodated, or rendered moot. Applicants therefore respectfully request that the Examiner reconsider all presently outstanding objections and rejections and that they be withdrawn. Applicants believe that a full and complete reply has been made to the outstanding Office Action and, as such, the present application is in condition for allowance. If the Examiner believes, for any reason, that personal communication will expedite prosecution of this application, the Examiner is invited to telephone the undersigned at the number provided.

Prompt and favorable consideration of this Amendment and Reply is respectfully requested.

Respectfully submitted,

STERNE, KESSLER, GOLDSTEIN & FOX P.L.L.C.



Tracy-Gene G. Durkin  
Attorney for Applicants  
Registration No. 32,831

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1100 New York Avenue, N.W.  
Washington, D.C. 20005-3934  
(202) 371-2600

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